

*United States Court of Appeals
for the Second Circuit*



**APPELLANT'S
REPLY BRIEF**

76-1348

TO BE ARGUED BY:
Edward Brodsky

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 76-1348

UNITED STATES OF AMERICA,

Appellee,

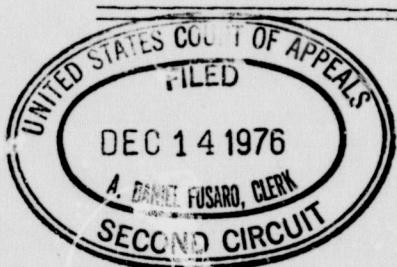
-vs.-

ROBERT BERKSON,

Defendant-Appellant.

On Appeal From The United States District Court
For The Southern District Of New York

REPLY BRIEF IN BEHALF OF
APPELLANT ROBERT BERKSON



EDWARD BRODSKY
Spengler, Carlson, Gubar,
Churchill & Brodsky
Attorneys for Defendant-
Appellant Robert Berkson
280 Park Avenue
New York, New York 10017
(212) 682-4444

HENRY J. BOITEL,
ALAN M. DERSHOWITZ,
of Counsel.

TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities	-ii-
Preliminary Statement	1
POINT I - Gallentine's Grand jury testimony should not have been received as sub- stantive evidence since its content did not conform to Federal Constitutional or evidentiary standards	2
1. Gallentine's grand jury testimony was conclusory, non-specific and other- wise incompetent, and should not have been received as substantive evi- dence	2
2. Conviction based upon Gallentine's testimony was violative of due pro- cess of law and of the defendant's right to confront and cross-examine the witnesses against him	5
POINT II - The government failed to establish guilt beyond a reasonable doubt	6
POINT III - The trial court erred in charging the jury as to the issue of 'conscious avoidance' in view of the nature of the government's proof	8
Conclusion	9

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Cases:</u>	
<u>In Re Millow</u> , 529 F. 2d 770 (2d Cir., 1976) ..	2, 3
<u>United States v. Eucker</u> , 532 F. 2d 249 (2d Cir., 1976)	6, 7, 8
<u>United States v. Magnano</u> , Docket No. 76-1011, slip sheet ops at 5471 (2d Cir., September 7, 1976)	9
<u>United States v. Natelli</u> , 527 F. 2d 311 (2d Cir., 1975)	5
<u>United States v. Santiago</u> , 528 F. 2d 1130 (2d Cir., 1976)	9
<u>United States v. Wolfson</u> , 437 F. 2d 862 (2d Cir., 1970)	6
<u>Federal Rules of Evidence:</u>	
Rule 701	4
Rule 704	4
Rule 801	3
<u>Other Authorities:</u>	
Weinstein Evidence § 602[03]	4-5

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 76-1348

UNITED STATES OF AMERICA,

Appellee,

-vs.-

ROBERT BERKSON,

Defendant-Appellant.

On Appeal From The United States District Court
For The Southern District Of New York

REPLY BRIEF IN BEHALF OF
APPELLANT ROBERT BERKSON

Preliminary Statement

The limited function of this reply brief will be to discuss the various authorities cited by the government in its brief. We shall not restate the arguments of our main brief, much of which have gone unanswered in the government's brief.*

* The government ignores the lack of precedent for the use, as substantive evidence, of grand jury testimony of the character upon which the government relied in the present case. (See: pages 17-24 of our main brief). Likewise, the government does not attempt to deal with the authorities cited at pp. 27-33 of our main brief, which demonstrate the objectionable nature of the content of the grand jury testimony.

POINT I

GALLENTINE'S GRAND JURY TESTIMONY
SHOULD NOT HAVE BEEN RECEIVED AS
SUBSTANTIVE EVIDENCE SINCE ITS
CONTENT DID NOT CONFORM TO FEDERAL
CONSTITUTIONAL OR EVIDENTIARY
STANDARDS.

1. Gallentine's Grand Jury Testimony was Conclusory, Non-specific and Otherwise Incompetent, and Should Not Have Been Received as Substantive Evidence.*

The government argues that:

"* * * The general rule, of course, is that normal rules concerning the form and admissibility of evidence are utterly inapplicable in a grand jury. In Re Millow, 529 F. 2d 770 (2d Cir., 1976)." (Gov. Br., at p. 9).

Recognizing this essential difference between grand jury and trial testimony, the government rejects as "unprecedented" and "irrational" our contention that Rule 801 does not justify the use at trial, as substantive evidence, of testimony which does not meet trial evidentiary standards of competency. The government's argument seems to be that Rule 801, by its terms, renders all grand jury testimony admissible so long as the inconsistency requirements of the Rule are met.

The government cites no authority in support of its argument. Its reference to In Re Millow, supra,

* We have advised the government that its quotation of Gallentine's grand jury testimony, at pp. 8-9 of its brief, is incorrect in that it omits the third question and fourth answer. Thus, the erroneous version in the government's brief makes it appear as though the answer to the fourth question is the answer to the third question.

demonstrates the error of its argument. In that case, a witness was held in contempt for failing to answer questions before a grand jury. The witness claimed that before he was obliged to answer any questions, he was entitled to go behind an electronic surveillance warrant, valid on its face, in order to raise a Constitutional and statutory objection to the manner in which the government had gathered the information which formed a basis for the questioning.

This Court rejected his arguments, noting, inter alia:

" * * * This conclusion is mandated by the wide latitude historically accorded to grand juries and by the need to avoid delay in grand jury investigations which neither adjudicate guilt or innocence nor proceed in the adversarial tradition of the trial courtroom. Thus, it has been held that a grand jury may ask questions based on evidence seized in violation of the Fourth Amendment, * * *; the grand jury may consider evidence obtained in violation of the Fifth Amendment, * * *; and it may rely upon hearsay or otherwise incompetent evidence where the nature of the evidence is revealed to the grand jurors,* * *. * * *" (529 F. 2d at 774).

It can readily be seen that Millow, supra, adds nothing to the government's argument and, in fact, supports the contention of the appellant Berkson. Nothing in the history or text of Rule 801 suggests that "otherwise incompetent evidence" becomes admissible as substantive evidence at a criminal trial merely because it has passed through the wide-meshed filter of a grand jury. To the contrary, the fact that a grand jury investigation is neither adjudicative nor adversarial compels the conclusion that the

use of grand jury testimony as substantive evidence should not be permitted merely as a matter of course, but, rather, solely in the exercise of the sound discretion of the trial judge, even if the testimony meets trial evidentiary standards. When, as here, those standards are not met, the matter ceases to be one of discretion, and becomes one of mandatory exclusion.

The government next argues that Gallentine's use of the conclusory term "aware", in his grand jury testimony, constituted permissible lay witness opinion evidence under Rules 701 and 704 of the Federal Rules of Evidence:

"Fed. R. Evid. 701, 704 permit a lay witness to testify in the form of an opinion or inference when the opinion is rationally based on the witness's perception." (Gov. Br., at p. 10).

The government cites no precedent for the proposition that a witness may give such a summary opinion with respect to the knowledge of another person. It must be clearly understood that we are not here concerned with an opinion concerning sanity or sobriety or emotional state. We are dealing with the question of what, if anything, Gallentine actually and contemporaneously told Berkson with respect to the fraudulent use of customers' securities. Judge Weinstein's analysis makes clear that the facts which the government sought to prove by Gallentine's testimony cannot properly fall within the law opinion provisions of the Federal Rules of Evidence:

"* * * Where the underlying observations can be stated without difficulty, Rules 602 and 701 which still require relative concreteness as contrasted to

relative abstraction. But where the witness encounters difficulty in disentangling the individual elements of his observation from the impression as a whole, the courts should not insist on the impossible chore of delineating the boundary line between personal knowledge and opinion." (3 Weinstein Evidence, § 602[03] at p. 602-10).

2. Conviction Based upon Gallentine's Testimony was Violative of Due Process of Law and of the Defendant's Right to Confront and Cross-examine the Witnesses Against Him.*

The government disputes our contention that the testimony in question was violative of the defendant's right to cross-examine the witnesses against him (Gov. Br., at pp. 11-12). In our brief, at pp. 35-36, following an analysis of the authorities, we conclude that there reaches a point where prior equivocal testimony, offered for the truth of its contents, is violative of the aforesaid Constitutional protection. In short, where the prosecutor seeks to argue merely from inferences which he seeks the jury to draw from prior testimony, the testimony becomes twice removed from the trial itself, and no meaningful confrontation is presented. Under such circumstances, the right to cross-examination is rendered illusory. The government makes no effort to deal with that analysis. The

* See our main brief at pp. 35-37.

problem is not discussed by either of the authorities cited by the government at page 12 of its brief.

POINT II

THE GOVERNMENT FAILED TO ESTABLISH GUILT BEYOND A REASONABLE DOUBT.

As to the sufficiency of the evidence against Berkson, the government argues that Berkson's "silent acquiescence" in the face of his alleged knowledge of the corrupt scheme provided a sufficient basis for conviction. The argument assumes that the government has established the requisite knowledge (See: Point I, supra).

In support of its contention, the government cites United States v. Wolfson, 437 F. 2d 862, 878 (2d Cir., 1970) and United States v. Natelli, 527 F. 2d 311, 318-19 (2d Cir., 1975). In both of those cases, however, the corpus delecti of the crime charged was the failure to disclose. In the present case, the crime charged was not the failure to disclose nor the making of false statements. In essence, the defendant was charged with participation in a theft, and with conspiracy to achieve that objective. No authority cited by the government stands for the proposition that "silent acquiescence", particularly under the circumstances involved in this case, will cause an individual to be a party to a theft.

The government also relies upon United States v. Eucker, 532 F. 2d 249, 254 (2d Cir., 1976), and argues

that "...In the proper context, silence may suffice to demonstrate participation in a conspiracy."

In Eucker, there had been an improper hypothecation of customers' securities, and various officers of a Wall Street brokerage firm were charged with conspiracy and substantive offenses. There was no evidence that the appellant in that case, one of the officers, knew of the hypothecation at the time it occurred. The charge against the appellant was that he conspired to file a false report with the Securities and Exchange Commission to the effect that the improper hypothecation of customers' securities had been corrected, when in fact it had not. (532 F. 2d at 254). In Eucker, this Court assessed the situation as follows:

"Although appellant argues that he was not a member of any conspiracy, but at most a silent onlooker, this argument is not persuasive. Where the goal of a conspiracy can be reached only through deception and concealment, silence which is designed to conceal may indicate an intention to conspire. United States v. Colasurdo, 453 F. 2d 585, 592-3 (2d Cir., 1971). The trial court instructed the jury that to be an act in furtherance of a conspiracy, 'silence must be a planned act' and that if intended to facilitate the conspiracy it can be an overt act in pursuance thereof. This was a correct statement of the law. * * *"

It is noteworthy that, in Eucker, there was also evidence of deliberate affirmative misconduct on the part of the defendant in misleading others concerning the financial position of the brokerage firm (532 F. 2d at 255).

Significantly, this Court noted that, "The wrongful act charged was the filing of the false report, not the hypothecation." (532 F. 2d at 255).

In the present case, no element of the crimes charged consisted of the failure to disclose or the filing of a false statement.

The authorities cited at p. 15 of the government's brief, with respect to circumstantial evidence and the conclusions which may be drawn therefrom, merely constitute a government effort to beg the question. At best, the question should be whether the defendant contemporaneously knew of the occurrence of the crimes charged in the indictment, and, if he knew, whether his silence was a "calculated effort to advance the purposes of the conspiracy" (United States v. Eucker, supra). As we argue in Point III, that is not the basis upon which the government tried the case, nor did the Court, in its conscious avoidance charge, articulate the issue to the jury on that basis.

POINT III

THE TRIAL COURT ERRED IN CHARGING THE JURY AS TO THE ISSUE OF 'CONSCIOUS AVOIDANCE' IN VIEW OF THE NATURE OF THE GOVERNMENT'S PROOF.

The government's brief argues that the Court's conscious avoidance charge was proper within the context of the entirety of the Court's charge to the jury. The fact is that the other portions of the charge, upon which the government relies, were clearly not given to the jury with

the conscious avoidance charge in mind. Even if the Court did have that intention, it was not communicated to the jury. The conscious avoidance charge had as its articulated purpose the function of assisting the jury in its determination of whether "a defendant acted knowingly" (Tr. 574). What "acts" of Berkson did the conscious avoidance charge have reference to? The government does not point to any for, indeed, there are none which can possibly be related to the issue of conscious avoidance.*

Conclusion

For all of the above reasons, as well as those advanced in our main brief, the judgment of conviction should be reversed, and the indictment should be ordered dismissed due to insufficiency of evidence; in the alternative, the defendant should be granted a new trial.

Respectfully submitted,

EDWARD BRODSKY, ESQ.
Spengler, Carlson, Gubar,
Churchill & Brodsky
Attorneys for Defendant-
Appellant Robert Berkson

HENRY J. BOITEL
Of Counsel.

* It is noteworthy that the authorities relied upon by the government, United States v. Magnano, Docket No. 76-1011, Slip Sheet Ops. at 5471, 5480 (2d Cir., September 7, 1976) and United States v. Santiago, 528 F. 2d 1130 (2d Cir., 1976), both involve situations where no exception had been taken at the trial level and the appellants were required to rely upon the "plain error" rationale. In the present case, specific exception was taken to the conscious avoidance charge. Moreover, the facts of Magnano and Santiago are inapposite to the present case.

